IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 3 OF 2000.

Shehnaz Mudbhatkal)
residing at A/702 Milton)
Apartments, Juhu Koliwada)
Lane, Santacruz (West),)
Mumbai - 400 049.)..Appellant.
(Petitioner in M.J.Petition)

VERSUS.

Arvind Ramkrishna)
Mudbhatkal of Mumbai,)
Indian Inhabitant,)
presently residing at)
A/702 Milton Apartments,)
Juhu Koliwada, Santacruz)
(West), Mumbai - 400 049.)..Respondent.
(Respondent in M.J.Petition)

...

Appellant in person

Mr.Pankaj Bhatt, for the respondent.

CORAL: S. B. MHASE &
R. S. MOHITE, JJ.

DATE : DECEMBER 23, 2004.

ORAL JUDGMENT (Per S.B.MHASE,J.)

1. This Family Court Appeal is directed against the judgment and decree passed in Petition No. 1945 of 1992 by the Family Court No. 2 at Bandra, Mumbai on 5th August 1999 whereby the petition filed by the appellant is dismissed. The appellant-wife (Hereinafter referred to as "the Petitioner") has filed Hindu Marriage Petition under Sections

13(1)(i-a) and 13(1)(i-b) of the Hindu Marriage Act, 1955 (Hereinafter referred to, in short, as "the said Act.") against the Respondent- husband for divorce. Petitioner has also prayed for permanent alimoney, injunction in respect of flat where petitioner is residing along with her daughters etc.

2. Section 13(1)(i-a) is a ground for divorce for treating the petitioner with cruelty after solemnisation of the marriage. Section 13(1)(i-b) is a ground for divorce for deserting the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. Thus, in the present case, the divorce was / is claimed by the Petitioner-wife on the ground of cruelty and desertion. However, in the present judgment we are not going to consider as to whether the Petitioner has proved the ground of cruelty and/or desertion as provided under section 13 of the said Act, because the petition filed by the Petitioner has been dismissed by the Family Court on the ground of maintainability of the petition.

3. Before we consider the factual matrix to the extent of the maintainability of the petition, as it was filed in the family court, we would like to state

that this petition has raised an important question of law in respect of the maintainability of the Hindu marriage petition by a non-Hindu under the said Act wherein the Respondent is also a non-Hindu. Since the issue was a crucial one and as the Petitioner was conducting the appeal in-person, we equally requested the Advocate General- Mr. V.A.Thorat to address the court. Accordingly, the learned Advocate General has also assisted us by addressing us with oral submissions and has equally put on record the written submissions in respect of the point involved in the present appeal.

4. The issue in respect of the maintainability of the present petition arises in the following factual matrix. We make it clear that we are not putting on record the pleadings of the parties thoroughly, as we have noticed that the pleadings are very lengthy and verbose. However, we are putting on record the material contentions raised by the husband and wife so as to adjudicate upon the point of maintainability of the Hindu Marriage Petition filed by the Petitioner in the family court.

5. The Petitioner is a Muslim by birth and the Respondent is a Hindu by birth. According to the

Petitioner-wife, the Respondent is a MBBS Doctor and in the year 1966 when the Petitioner was hardly of 15 years of age, she came in contact with the Respondent as the Respondent was attending the father of the Petitioner as he had suffered a paralytic stroke. The Respondent was visiting the house of the Petitioner. Taking the said opportunity, according to the Petitioner, the Respondent made physical and mental advances wooing the Petitioner. At that time, the Respondent was 29 years old. As a result of which, love developed between them. The Petitioner has further alleged that her marriage was settled with one Mr.Vijay by the family members. However, the Respondent agreed to marry with her and persuaded her to break the said marriage. At that time, the Petitioner was 20 years old. However, after the engagement had broken, according to the Petitioner, the Respondent refused to marry her and insisted that the Petitioner shall accept the job as an airhostess with the Indian Airlines. Accordingly, the Petitioner had accepted the job as an airhostess in December 1971. While working as an air-hostess, the Petitioner realised that the Respondent is behind her money and that the Respondent is playing with her feelings. The Petitioner states that during the period 1972-73, the Petitioner had two pregnancies from the Respondent

which were terminated by Doctor Nagpal, a friend and colleague of the Respondent at a private hospital. The Petitioner further stated that finally the Respondent agreed to marry, however, put a condition that the Petitioner shall take up a job with Hotel Centaur as a Front Office Receptionist to make good the loss of her job with the Indian Airlines, secondly the Petitioner shall get converted to Hindu religion. The Petitioner has stated that she gave up the job with the Indian Airlines and accepted the job with Hotel Centaur in August 1975. On 9th November 1975, the Petitioner was converted as Hindu by carrying out the conversion ceremony at Masurashram under the guidance of the senior priest of the said Ashram - Bramhachari Vishwanathji. Her name was changed from "Shehnaz" to "Mrualini". Thereafter on the same day, i.e., on 9.11.1975 Petitioner married with the Respondent according to the Hindu rites at Mumbai at the said Masurashram where the conversion had taken place. Thereafter, the Petitioner resided and co-habitated with the Respondent at 93/D, Doctors' Quarters, Delisle Road, Bombay for three years along with the mother of the Respondent. Out of this wed-lock, the Petitioner and the Respondent are having two daughters. The elder daughter - Soniya was born on 9th December 1976 and younger daughter Shahazia was

born on 15th October 1980.

6. The Petitioner has averred that within few months of the marriage Petitioner found that the Respondent has lost interest in the marriage and the Respondent was already involved with another lady doctor Kanta Mancharamabi since his medical college days who had jilted the Respondent for someone better, but had maintained the relations with the Respondent. As a result of the conduct of the Respondent, the Petitioner states that the Petitioner was drawn back to her religion by birth and since 1977 or thereabout the Petitioner actively practiced the tenets of the Islamic faith.

7. According to the Petitioner, in the year 1978 she has taken the job with Saudi Arabian Airlines so as to meet the increased financial burden of the family. In the year 1982, the Saudi Arabian Delegation had come to India to recruit the doctors. The Respondent compelled the Petitioner to have a communications and pursuations with the officers of the said delegations to secure a job for the Respondent as a doctor in the Saudi Arabia. The Petitioner has claimed that as a result of her efforts even though the Respondent was not eligible for such

appointment, Respondent was appointed on 12.3.1983 at King Fahd Hospital, Gizan, Saudi Arabia. However, Respondent did not allow the Petitioner to give up the job with the Saudi Arabian Airlines so that Petitioner can join the Respondent at Saudi Arabia. The Petitioner has further averred that in order to overcome the incompetency of the Respondent, the Respondent went to the extent of fraudulently converting himself into a Muslim and compelled the Petitioner to perform a Muslim marriage (Nikah) with the Respondent so that the Respondent would get a better treatment in a Muslim country. The Petitioner has stated that although the Respondent performed Nikah in the year 1982, the Respondent persuaded the Kazi in giving a back dated certificate. The Petitioner has stated that the Nikahnama and the certificate which are produced along with the petition are back dated one and the said Muslim marriage was a mock marriage and hence was not registered. Petitioner claims that the said Muslim marriage is of no legal effect and does not affect the marriage of the Petitioner and Respondent performed according to the the Hindu rites in the year 1975 and the said marriage was/is still valid and subsisting. Petitioner claimed that the said Muslim marriage was not a bonafide one and that the Respondent's interest

was to get a job. Petitioner further stated that the Respondent continued to be a Hindu inasmuch as Respondent observes Hindu customs, goes to Hindu temples and practices Hindu religion. Petitioner has stated that the Respondent has never practised Islamic faith and has no belief in the prophet; the said conversion was not, therefore, conversion in the eyes of law.

. The Petitioner returned from Saudi Arabia in February 1992 and thereafter the dispute between the parties commenced.

8. In reply to this, the Respondent has stated in his Written Statement that it is true that the Petitioner underwent a form of conversion to Hinduism on 9th November 1975 and the marriage took place according to the Hindu Vedic rites. However, Respondent further claims that the Petitioner did not believe in the Hinduism and the said conversion was undergone by her only with a view to enable her to marry the Respondent who was then Hindu. Respondent further stated that the parties realised that the said marriage was null and void in view of the fact that the Petitioner continued to practice the Islam and offered Kurbani and Bakari-Id regularly. Respondent

further pointed out how the Petitioner continued to be a Muslim from the year 1978 onwards. The Respondent has further stated that, due to his association with the Petitioner for several years, Respondent had been inclined towards the Islamic faith and therefore two days later to their Hindu marriage, i.e., on 11.11.1975, the Petitioner reconverted and the Respondent converted himself to the Islamic faith out of his own free will and a Nikah ceremony according to the Islamic rites was performed. The Respondent stated that the Petitioner has admitted to have undergone the nikah ceremony after conversion to the Islam. The Petitioner practices the tenets of the Islam and never practiced the Hindu religion for a single day, except for conversion and marriage which according to her was demanded by the Respondent. Respondent has submitted that the Petitioner did not believe in Hinduism and the said conversion was undergone by her only with a view to enable her to marry the Respondent who was then Hindu. Respondent has further stated that the parties herein were advised, in view of the above state of affairs and since there was no provision for conversion of a person actively professing the Islamic religion and continued to do so, to Hinduism under the conventional and orthodox Hindu dharma, the ceremony preformed on

9.11.1975 according to the Vedic rites was invalid and the marriage performed between the parties was non-est and nullity in the eyes of law. Respondent has admitted that prior to 1975 the parties herein came to know each other and after a long courtship, decided to marry each other. Then Respondent has pointed out how while in Saudi Arabian Airlines the Petitioner has shown herself to be a Muslim.

. The Respondent has denied that the father of the Petitioner was treated by him but Respondent has admitted that in the year 1966 the Respondent was working in the Railway Hospital at Bulsar(Gujrat) and has stated that the father of the Petitioner was treated by Doctor Siddique from the Railway Hospital. Respondent has pleaded that later on when the Petitioner came to know the Respondent, it was the Petitioner who used to pursue the Respondent (him) as the Respondent was an eligible batchelor and highly qualified whereas the Petitioner and her family were not much educated and financially unstable. The Respondent has denied that the Respondent has made physical and mental advances towards the Petitioner while the Petitioner was 15 years of age. The Respondent further denied that the Petitioner exploited the feelings of the Petitioner. The

Respondent stated that the Petitioner got call from the Indian Airlines and the Petitioner opted for the said job rather than to marry the boy of her family's choice. The Respondent has denied that in the year 1972-73 the Petitioner had two pregnancies from the Respondent and that Dr. Nagpal being railway doctor and General surgeon and colleague of the Respondent, terminated the said pregnancies. The Respondent has denied that the Respondent did not marry the Petitioner as he did not want to loose so called well-paid job with the Indian Airlines.

. He has further stated that the Petitioner had told that Captain Dhillan was to take action against her for irregularities committed by her and for smuggling. Therefore, the Petitioner decided that before such an action was taken against her, the Petitioner should resign and accordingly she resigned her job from the Indian Airlines and not at the instance of the Respondent. The Respondent has further pleaded that there was no question of the Petitioner drawing back to the religion by birth since 1977. The Respondent submitted that except for undergoing the formality of conversion on 9.11.1975 the Petitioner has before the said date and even thereafter always been a Muslim and has been actively

practising the tenets of the Islamic faith. The Respondent has further pleaded that since the time of their marriage, i.e. 11.11.1975, according to the Islamic rites, the Petitioner and the Respondent have been both Muslim by religion and actively practising the Islamic religion.

. The Respondent has further stated that he was appointed as a Doctor in the Saudi Arabia and left for the Saudi Arabia in the March 1983 but the Respondent has denied that at the intervention, persuasion and the contacts of the Petitioner, the Respondent was appointed in the Saudi Arabia. The Respondent has denied that the Respondent was not qaulified for the said post. The Respondent has claimed that the Respondent was a graduate and had qualifications and experience and, therefore, the Respondent was selected on merit. The Respondent has denied that in order to overcome his incompetency, the Respondent went to the extent of fraudulently converting himself into a Muslim or that the Respondent compelled the Petitioner to perform Muslim marriage with the Respondent. The Respondent has reiterated the story of the conversion and of Nikah. The Respondent has specifically denied that the Nikah was performed in the year 1982 or that the Respondent

persuaded the Kazi to issue a back dated certificate and stated that if back dated certificates were to be prepared the Petitioner would not have signed those documents. The Respondent denied that the Muslim marriage is a mock marriage and, therefore, was not registered one.

9. From the above pleadings of the parties, following facts can be deducted:

(a) That, the Petitioner was a Muslim by birth and was converted to Hinduism on 9th November 1975.

(b) That, on 9th November 1975 the marriage of the Petitioner and the Respondent was preformed at Masurashram, Mumbai by the Hindu priest according to the Hindu rites.

(c) That, the parties were acquainted to each other since about 1966. The Respondent was appointed as a Doctor in 1966 at Bulsar, (Gujrat) where the father of the Petitioner was working in the Indian Railways. That the father of the

Petitioner had suffered a paralytic stroke. (However, the Respondent had denied that he had treated the father of the Petitioner.)

(d) That the Petitioner and the Respondent were known to each other and had love. Even though it is disputed that as to who has taken a active role in developing the said relationship.

(e) That, the marriage of the Petitioner was settled with another person by the family members and it was broken. At that time, the Petitioner had received a call from the Indian Airlines and in this respect, the Petitioner had a consultation and advice with the Respondent.

(f) That, the Petitioner gave up her job with the Indian airlines prior to her marriage in August 1975 and joined the services with the Hotel Centaur as a front Office Receptionist.

(g) That, in the year 1978 the Petitioner

joined the Saudi Arabian Airlines.

(h) That in the year 1982 there was a Health Delegation from the Saudi Arabia for the recruitment of the doctors and that the Respondent was appointed as a doctor in King Fahd Hospital, Gizyan; since March 1983 till he returned back 1992.

(i) That, the Petitioner was reconverted to Islamic religion (as to whether since March 1982 or from 11th November 1975 being a disputed fact.)

(j) That, the Petitioner and the Respondent both have performed the marriage according to the Muslim law (i.e., Nikah) (However, as to whether the said marriage was performed on 11th November 1975 or in the year 1982 or thereabout is disputed; as according to the Petitioner - wife, the documents in respect of the conversion of the Respondent to the Muslim religion and Nikah were prepared ante-dated. As against this, according to the Respondent-husband those documents

were not ante-dated but the said conversion and marriage had taken place on 11th November 1975 only,i.e., two days after the celebration of the Hindu marriage.

(k) That, on the date of the presentation of the petition, both, Petitioner and Respondent are admittedly Muslims.

10. The Respondent has raised objection in respect of jurisdiction of the family court on the ground that the parties to the petition are Muslim and both have been following the Muslim religion since 11th November 1975. Therefore, the marriage petition, as filed under the said Act, is not maintainable. The family court has accepted the contention of the Respondent that the parties are Muslim on the date of the presentation of the petition. The court has further observed that as a result of the performance of the nikah (Muslim marriage) by the parties subsequent to the Hindu marriage, the Hindu marriage has evaporated, because not-existant does not require any declaration of dissolution. The Family Court have also recorded a finding that Hindu marriage performed between the Petitioner and Respondent is null and void

as the conversion of Petitioner to Hinduism was formal and was not genuine. Therefore, following questions arise for our consideration.

1. Whether the Petitioner was converted to Hinduism on 9.11.1975 or thereabout and that the said conversion is genuine and bonafide one ?

2. Whether the Petitioner and Respondent have performed their marriage according to the Hindu rites and rituals ?

3. Whether the Hindu marriage performed between the present Petitioner and Respondent is valid one ?

4. Whether the Petitioner and Respondent were reconverted and converted to Mahomedanism on 11.11.1975 and got married according to the Muslim law, i.e., performed the Nikah ?

5. Whether the Petitioner and Respondent both got reconverted and converted to the Mahomedanism and performed their marriage according to Muslim law, namely, nikah in the year 1982-83 ?

6. Whether the document of conversion of the Respondent to Mahomedanism and performance of the marriage according to the Islamic rites are ante-dated and thereby it is a mock or sham document ?

7. What is the effect of the Nikah which was performed after the performance of the Hindu marriage (i.e., two days after the performance of the Hindu marriage as alleged by the Respondent; and/or in the year 1982 to secure a job in a Muslim country as alleged by the Petitioner - wife) on Hindu marriage preformed on 9.11.1975 ?

8. Whether the Hindu marriage petition as filed by the Petitioner for dissolution of the marriage and permanent alimony and claim for injunction in respect of the matrimonial home is maintainable ?

11. Since it is an admitted fact that the Petitioner was a Muslim by birth and the Respondent is a Hindu by birth, the marriage between the Petitioner and Respondent would not be valid unless both are Hindus, as required under section 5 of the said Act. Section 5 states that "*A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled.*" Thereby, it contemplates that on the date of performance of the marriage, the parties must be Hindus. Section 2(3) of the said Act enumerates the persons who are "Hindu".

Section 2(3) is as follows:

> "The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions

contained in this section"

. In sub-Section (1) of Section 2, it is stated as to whom this Act applies. In sub-section (2) of Section 2, it is made clear that "*Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central government, by notification in the Official Gazette, otherwise directs."*

. In the result, even if any person is covered under sub-section (1) of Section 2, but if he happens to be a member of the Scheduled Tribe within the meaning of Clause (25) of the Article 366 of the Constitution of India, the Act will not apply to such a person unless the Central Government, by the notification in the official gazette, otherwise directs, that means makes the Act applicable either wholly or for a limited purpose.

. Clauses (a) and (b) of sub-section (1) of Section 2 are not much relevant for our discussion. However, clause (c) of sub-section (1) of Section 2 is relevant for our purpose, which reads as under:

2. APPLICATION OF ACT: (1) This Act applies-

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jaina or Sikh by religion; and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.- The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:-

(a).....

(b).....

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion."

12. From the above, it can be safely stated that the persons who are Muslim, Christian, Parsi or Jew by religion are not covered under the Hindu Marriage Act. However, it can be said that the Act applies to the Hindus wherein a Virashaiva, a Lingayat or a follower of the Brahmo Prathana or Arya Samaj are included.

. Explanation (c) as stated above, points out that any person who is a convert or reconvert to Hindu, Buddhist, Jaina or Sikh religion is a Hindu, Buddhist, Jaina or Sikh as the case may be. In short, if any person converts or reconverts to one of these religions, namely, Hindu, Buddhisum, Jaina or Sikh, the said person will be governed by the provisions of the said Act and the said Act will apply. Thus, he will be treated as a Hindu in view of this provision, i.e., sub-section (3) of Section 2.

13. Before we proceed to consider the matter on facts, it is important to note that the word "Hindu" appears only in Sections 5, 13(1) and 13(2), apart from Sections 1 and 2. What is the effect of this will be considered in the later part of the judgment.

14. It is suffice to state at this stage that the person must be Hindu to perform a marriage as contemplated in section 5 of the said Act and he shall be Hindu to whom the Act applies as stated in Section 2.

15. Coming back to the facts in the present case, therefore, the marriage between a Muslim wife and Hindu husband, namely, the Petitioner and

Respondent herein as per the religions of their birth was not possible under the said Act. However, the case of the Petitioner is that prior to her marriage on 9.11.1975, she got converted to Hindu religion and thereafter the said marriage had taken place. Therefore, if it is proved that the Petitioner is a convert Hindu prior to the marriage, the provisions of the said Act will apply to the Petitioner, as discussed above and the Petitioner will be taken as a Hindu at the time of marriage. Therefore, as the marriage between the Petitioner and Respondent is between two Hindus, satisfying the condition laid down in section 5, the marriage will have to be held as a valid marriage.

. Even though old Shastric law does not permit a conversion of non-hindu origin, the same is not the case in view of the statutory provisions pointed out above, which permit conversion and/or reconversion to and from Hinduism, Buddhism, Jainism and Sikhism. Even prior to enactment of the said Act, as against the position in the Shastric law, it has been held in a long line of cases that the conversion to Hindu Religion is permissible. The reference may be made to the following cases.

1. (1885) 12 IA 72, Fanindra v/s. Rajeshwar.

2. AIR 1923 PC 21, Sahadeo v/s. Kusum.

3. AIR 1922 PC 228, Palaniappa v/s. Alagan.

4. AIR 1932 PC 34, Gopal Maharaj v/s. Sitadevi.

5. AIR 1928 Madras 1279, Morarji v/s. Administrator General.

. In **AIR-1971 SC 2352, Perumal V/s. Punnaswami** the Supreme Court has held that a mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu nor is a bare declaration, that he is a Hindu sufficient to convert him to Hinduism. But a bonafide intention to be converted to the Hindu faith accompanied by conduct unequivocally expressing, that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion.

. *AIR-1965 SC 1179, Punjabrao v/s. Dr. D.P. Meshram,* the Supreme Court has now held that if a public declaration was made by a person that he had ceased to belong to the old religion and accepted another, he would be taken as professing the new religion. In the face of such open declaration, it would be idle to inquire further whether his

conversion to such other religion was efficacious.

. Now, thus it will be clear that no specific ceremony or purification is necessary for conversion to Hindu religion; a bonafide intention to be converted to Hindu faith accompanied by the conduct unequivocally expressing that intention may be sufficient and if there is a public declaration made by the person he ceases to belong to old religion and accepts another religion.

16. Now coming to the facts of the present case, in the light of the above cited position, it is to be noted that the parties have acquaintance from the year 1966 when the Petitioner was of 15 years of age and the Respondent was of 28 years of age. From the pleadings, it is revealed that the Respondent has accepted that it was the Petitioner who used to pursue the Respondent. Having accepted that position, the point of acquaintance goes back to the year 1966-67. From the evidence also it can be seen that, the Petitioner has deposed that she came in acquaintance with the Respondent in the year 1966 and that he had physical and mental advances towards her which resulted into development of love. She has also stated that till the year 1971 they had relations,

however, it was noticed that the Respondent was not likely to marry her. The family members of the Petitioner had settled her marriage with one Mr. Vijay. From the testimony of the Respondent it is clear that the said fact is also accepted by him. The only question remains as to whether the said marriage was broken by the Respondent or it was broken by the Petitioner since she got appointment in Indian Airlines. Whatever may be the aspect, the fact remains that the said marriage was broken. Even though the Respondent has not pleaded in the written statement that, for the first time he came in acquaintance with the Petitioner in the year 1971, he has tried to develop such a new case in his examination in chief, that is only to come out of a situation that since the year 1966 the Respondent was having relations with the Petitioner. However, he has admitted in his written statement and also in his cross-examintion that the Petitioner had consulted him as to whether to accept the job in Indian Airlines. Even though in written statement the Respondent has stated that he had no physical and mental advances towards the Petitioner, surprisingly, in a statement before the court he has stated that in December 1971, the Petitioner came and met him at Mumbai and told him that she had received a call from the Indian Airlines.

He denied that he insisted to accept the said job. But he has accepted that after selection of the Petitioner as an air-hostess, the Respondent helped her to have the medical examination and after that the Respondent went to see off the Petitioner when she was going for training at Delhi. He further stated that at that time she had told the Respondent that the Respondent will see her in Delhi training period. He stated that accordingly he went to Delhi on 25th January 1972 and the Petitioner had booked a room in the Hotel named Florain Dariyaganj and the Petitioner and Respondent stayed there together, and registered their names as husband and wife in that hotel and that they had physical relations during the stay for near about 5 days and thereafter he returned to Bombay.

. He further stated that on 26th January 1972 we decided to marry with each other and at that time the Petitioner was a trainee air-hostess in the Indian Airlines in Delhi. He has also admitted that after the decision to have a marriage, there was engagement ceremony in July 1972 and at the engagement ceremony there was exchange of rings, namely, he had put up a ring in the finger of the Petitioner and the Petitioner had put up a golden ring in the finger of the Respondent; that mother of the Respondent gave

some jewellery in the said ceremony; This was announced in the newspaper "Times of India". No doubt, he has denied that it was a ceremony as per the Hindu rights and customs. He has also denied that there were two abortions of the Petitioner between the period 1972-73. However, he has admitted in cross-examination that it is true to say that on 1.9.1972, he has prescribed the Petitioner the pregnancy test tablets. He has admitted that as per the letter of the Petitioner, the Respondent had prescribed these tables to the Petitioner. He has categorically admitted that both of us, means the Petitioner and Respondent, were responsible for the delayed menses. The Petitioner has also examined Doctor Nagpal at Exhibit 225. Though he has not tried to support the Petitioner, however, the earlier conversation on telephone was recorded by the Petitioner and transcription of the same was produced in court which is at Exhibit 226. Dr.Nagpal has accepted his voice in the said tep-recorded material and equally accepted the telephonic transcription. From the said transcription, it is very evident that the Petitioner tried to have witness summons for said Dr. Nagpal, but it is the respondent who had contacted him and has interfered with his testimony. In this conversation, even though Dr.Nagpal tried to

be non-committed, from the several answers given by him it is revealed that the Petitioner was pregnant and treatment for termination of said pregnancies was given by Dr. Nagpal. The preponderance of possibilities is in favour of the case made out by the Petitioner. Therefore, what we find is that in between 1972-73 there were two abortions of the Petitioner, and the Respondent was responsible for those pregnancies and termination of those pregnancies. This inference can be very easily drawn because he has admitted that on 25th January 1972 when he had been to Delhi he had such a relations as husband and wife and on 26th January 1972 they have decided to marry and in July 1972 the engagement was carried out. Therefore, we find that there were two abortions in the year 1972-73 as pleaded by the Petitioner.

17. We would like to make it clear that, this aspect we are scrutinising for the purpose of finding out as to whether conversion of the Petitioner has taken place or not; And from this angle, the following facts are important: that the acquaintance of the Petitioner with the Respondent since 1966; development of love for each other and the fact that they were consulting to take a job with Indian

Airlines and to break the marriage of the Petitioner with one Mr. Vijay that when the Petitioner was sent to training for Indian Airlines the Respondent helped her in getting the medical clearance and that while she was undergoing training he had sexual relations, as stated above and they decided to marry in the year 1972 and thereafter the engagement was made which was published in Times of India. Thereafter, the Petitioner converted as Hindu on 9.11.1975 after she had given up job and after having joined the job at Hotel Centaur. All these facts pleaded by the Petitioner are proved and established. What is important to be taken into consideration is that the Muslim girl coming into contact with a Hindu person from 1966 onwards who had sexual relations with the Respondent and thereby has decided to marry him, definitely must have developed love and affection, apart from person, equally for the Hindu faith. Therefore, she got converted to Hinduism on 9.11.1975 and thereafter the Hindu marriage was performed.

. Specifically a question was asked to the Respondent in cross-examination "Can you (Respondent) tell what material benefit the Petitioner would get if she married you as per Hindu religion ceremony and custom ?" The answer given is that the question was

asked by my lawyer hence I do not know what is meant by material benefit. He has admitted that when the Hindu marriage was preformed, he was not having any flat in his name or any property or car and the Petitioner did not have material benefit from him during the Hindu marriage ceremony and custom. This was being asked asked to find out whether Hindu marriage and the conversion to the Hinduism was with an ulterior motive on the part of the Petitioner to get any material benefit and thereby the conversion was not a bonafide one. However, the long history of love between the parties coupled with the fact of their physical relations lead to only inference that the Petitioner had bonafide desire and intention to convert to Hinduism and get married with the Respondent. Therefore, a ceremony of conversion to Hinduism was carried out at Masurashram on 9.11.1975. So far as the conversion is concerned she has produced a photograph at Exhibit 124 wherein the priest of the said Masurashram is seen and one of the neighbours of the parties, namely, Mr. and Mrs. Sarkar are also seen in the said photograph along with the father, mother and sister of the Respondent. Some religious rites being performed are shown in the said photograph. Ultimately, what we find is that on 9.11.1975 the Petitioner bonafide got converted

herself to Hinduism and we accordingly record our finding. We have recorded a finding that conversion of the Petitioner to the Hinduism is bonafide and genuine because it was a case and submission of the Respondent- husband relying upon Sarla Mudgal's Case reported in 1995(3) SCC 635 that the conversion of the Petitioner to Hinduism was with an object to have marriage with the Respondent and the conversion of the Petitioner was not genuine. But we find that the observation of the Sarla Mudgal's case will not apply in the present facts of case, because the Apex Court has made observations in the facts and circumstances wherein the converts were trying to justify conversion to Islam to justify their second marriage which converts have performed without dissoving the first marriage which was a Hindu marriage. Thus, the facts of this case and Sarla Mudgal's case (supra) are not akin so as to attract the said ratio. We, therefore, hold that covnersion of the Petitioner was genuine, bonafide and not for any material gain since the Respondent was not possessed of any property which must have attracted the Petitioner.

18. So far as the marriage is concerned, the Petitioner has pleaded that the marriage was according to the Hindu rites. She has produced on record the

photographs of her engagement with the Respondent at Exhibits 121, 122 and 123 which show that mother, sister and other family members of the Respondent were present in the said ceremony on 4.8.1972. Photographs at Exhibits 128 to 130 are the photographs of the marriage. Photograph at Exhibit 128 shows that the Petitioner and Respondent are taking rounds around the fire. The Petitioner has stated in her evidence that these are the seven pheras taken around the fire. No doubt, she was not able to describe the name of the ceremony, however, the fact remains that 7 pheras were taken around the sacred fire. Thus, the marriage was performed as per the Hindu rites. In cross examination the Respondent has accepted all these photographs as photographs of his marriage with the Petitioner. Only ignorance he has shown is in respect of the ceremonies. However, the photographs thereby appear to be genuine one and, as per the Petitioner's submissions in examination-in-chief, which has remained unshattered in the cross-examination by the Respondent, these are the photographs of the marriage.

19. Apart from that, there is a clear cut admission in the written statement of the Respondent that on 9.11.1975 there was a conversion of the Petitioner to Hinduism and the marriage has taken

place according to the Hindu rites. The only claim made by the Respondent is that the said conversion was for the purpose of marriage and there was no conversion in real sense and, therefore, the said marriage is null and void. However, what we find is that the conversion and the reconversion is permissible in both the personal laws. But in the facts of the present case, the day on which the marriage had taken place the Petitioner had bonafidely converted herself to the Hinduism and the marriage according to the Vedic rites was performed.

. This Hindu marriage was performed in the year 1975 and the contention qua that marriage is being raised, for the first time, in a petition filed in the year 1992, that this marriage is null and void. At no point of time prior to this, it was the case of the parties that that Hindu marriage was null and void. On the contrary, what we find is that the said marriage was registered in the year 1978 as a Hindu marriage by the parties. The signatures on the registration form have been accepted by the Respondent. Only contention he has raised is that those signatures were taken at the time of marriage itself and he was not aware that the said marriage was registered on 2.8.1978. It is very difficult to

believe this statement of a MBBS doctor that he has not signed those documents on 2.8.1978 and it was signed in the year 1975 and that the said marriage was not registered in the year 1975 and he has no knowledge that it was registered on 2.8.1978. What we find is that the marriage which was celebrated on 9.11.1975 was registered on 2.8.1978. We ultimately find that the conversion of the Petitioner to Hinduism was a genuine, bonafide and valid one. Since there are ceremonies performed and equally a declaration by the Petitioner with a Masurashram who has given a certificate to that effect and later-on the marriage was registered. Therefore, we reject the contention of the Respondent that the said marriage, performed on 9.11.1975 between the Petitioner and Respondent, i.e., non-Hindu and Hindu was null and void. We record our finding that the said marriage was valid one and was in accordance with the provisions of the said Act. Since the requirements of Sections 5 and 7 of the said act are satisfied in view of the completion of the Saptapdi, i.e., taking of seven steps by the bridegroom and bride before the sacred fire.

20. Therefore, the finding recorded by the trial court that "the conversion of the Petitioner to the Hinduism was never genuinely professed nor has she

proved to have adhered to the tenets of Hinduism after the rituals of conversion to Hinduism and that the alleged marriage between the parties on 9.11.1975 is not valid one and it is ab-initio void" are not proper and we set aside those findings of the trial court. Since we find that very much weightage has been given by the trial court to the fact - as to whether the Hindu name is adopted by the Petitioner or not or that she professed an Islamic religion in latter years. In fact, it is the specific case of the Petitioner that since 1977 she has been professing the Islamic religion and therefore her conduct from the year 1977 onwards would not have any effect on a fact as to whether the genuine conversion of the Petitioner had taken place at the time of Hindu marriage in the year 1975. On the contrary, this fact shows her case of re-conversion to Islam as a genuine one. Therefore, we disagree with the trial court finding and record our finding that conversion of the Petitioner to the Hinduism was genuine one and the Hindu marriage was also genuine one.

21. The next point is of Muslim marriage between the parties. The wife has stated that since the year 1977, she has started to profess Muslim religion. The name of elder daughter is Soniya since at the time of

her birth the Petitioner was professing the Hindu religion. However, the Petitioner has further stated that when the younger daughter - Shahazia was born, she was professing the Muslim religion, therefore, she has given a Muslim name to the second daughter. Though, the Respondent has tried to bring on record that the Petitioner was professing Muslim religion after their Hindu marriage, all those documents are of the subsequent years of 1977 onwards. Only one document, namely the Passport is of the year 1972. However since the passport has been issued in the year 1972, that will be naturally showing the religion of the Petitioner as Muslim, because she got converted to Hinduism in the year 1975. Therefore, that document will not also help to show that the Petitioner was never converted to Hinduism.

22. What we find is that both parties have accepted that after 1977 the Petitioner was professing the Muslim religion. The question then crops up is : when the Respondent got converted to Islam and performed Nikah with the Petitioner. According to the Petitioner the said fact had taken place in the year 1982 and that the Respondent has prepared back dated documents. As against this, it is the specific case of the Respondent that two days after the Hindu

marriage, he got converted to Islam as a result of the long association with the Petitioner and performed a Nikah with her.

. So far this aspect is concerned, we would like to analyse the evidence. In order to establish conversion of the Respondent and his Nikah, the Respondent has brought on record two documents, namely, a Declaration Certificate issued by Kazi Mohammed Sualeh Lounday and the Marriage Certificate issued by the same Kazi. That Declaration Certificate is dated 24.9.1984 wherein it is stated that Shri. ANWAR (ex-name Arvind s/o Mudbhatkar) solemnly declare that he was embraced Islam in 1975 in Bombay by religious person (i.e., Maulana and he was married one Smt. SHEHNAZ D/O MEHMOOD MOHAMMED SANE on 9th November 1975. The Marriage Certificate issued by the same person is dated 24.9.1985. This certificate also shows that the date of the marriage is 11.11.1975. Then the other particulars in respect of the persons present, i.e. witnesses, have been stated. However, it is stated at the bottom of the Marriage Certificate that the particulars are according to the original document. What is important to be noted that even though both these documents state that the conversion and nikah have taken place on 9.11.1975, but these

documents have been issued by the said Kazi Mohammed Sualeh Lounday on 24.9.1984. There is no other document coming forward which shows that the Petitioner and Respondent were re-converted and converted to the Islam and performed Nikah on the said date, i.e., on 9.11.1975.

23. The case of the Petitioner in respect of these documents is that in the year 1982, when there was a Health Delegation from the Saudi Arabia to recruit the doctors, when she was working with Saudi Arabian Airlines, the Respondent wanted to join the services there in Saudi Arabia. Therefore, she was asked by the Respondent to exert to get a job for him. She has stated that to secure said job for the Respondent in a Muslim country and to have a better treatment there, these two documents were prepared. Accordingly, she has pleaded in the petition and also stated in her evidence to that effect.

24. So far as the back dating of these documents is concerned, she has explained that those documents were prepared back-dated at the instance of the Respondent so as to give legality to the two daughters. We feel that- that must have been probably done by the parties, as the parties may be under the

impression that if they get converted to Islam and have a Nikah performed in the year 1982 the daughters born out of their earlier Hindu marriage will be shown as Hindu daughters, that would result into making them illegal or illegitimate. Therefore, documents must have been prepared ante-dated. What we find is that both these documents were prepared by the parties without any legal advice on their own apprehensions of law. The explanation offered by the wife is most probable and convincing.

. On the other hand, what we find is that in order to demonstrate that both these documents were genuine, apart from the testimony of the Respondent, the Respondent has not examined any other witness, and more specifically said Kazi Mohammed Sualeh Lounday, who had issued those certificates. From the said Marriage certificate it is also revealed that the said marriage was performed by Kazi Sharif Mohammed Ali Lounday and not by Kazi Mohammed Sualeh Lounday. To prove the performance of the said Nikah on 11.11.1975, it was obligatory on the part of the Respondent to examine the said Kazi Sharif Mohammed Ali Lounday who had performed their marriage. However, this important witness was also not examined by the Respondent. So also, there was a witness to their marriage, namely,

Abdul Sattar s/o Ali Hasan. He was also not examined by the Respondent but has been examined by the Petitioner. Equally, Vakil - Gulam Husein s/o Kutbuddin Ansari was also not examined. When it was a disputed fact as to whether the Nikah has taken place on 11.11.1975 or in the year 1982, it was obligatory for the the Respondent to examine all these witnesses or at least one of them to establish the said fact.

However, the Respondent has not examined any of them.

25. As against this, the Petitioner has examined herself and has stated in her evidence under what circumstances these documents were prepared. The Petitioner has also examined witness No.2 (at Exhibit 213) one Mr.Abdul Sattar Ali Hasan who is witness to marriage performed as per Muslim law. He has stated that he knows the Petitioner for last 20 years. He has stated that in the year 1977 he had a contact with the Petitioner, the Petitioner introduced him to the Respondent. He has stated that the Respondent had told him that he (the Respondent) was not getting a job in Saudi Arabia, hence he wanted a certificate as a Muslim. Therefore, this witness told that he has to become a Muslim. He has further stated that he has arranged for a Kazi and Kazi performed the Nikah of the Petitioner and Respondent. Immediately, the

certificate was prepared and the Nikahnama was issued to the Respondent. He has specifically stated that it was performed in the year 1982 but he does not remember the exact date and month. He has stated that the Respondent told him that if the date of nikahnama is not adjusted according to the birth date of the children, they will not get the facilities in Saudi Arabia and they will become illegal as (Najayaj), hence he hold to change the date on the nikahnama. He has stated that the date mentioned in the said documents is back-dated in the interest of the children; that document is at Exhibit 215. In cross-examination it is stated by this witness that the Respondent told him to prepare the nikahnama of back date after the preparation of nikahnama certificate. Both these documents were signed by the Petitioner and Respondent.

. It was suggested to this witness in cross-examination that the marriage was performed on 11.11.1975. The said suggestion was specifically denied by him. It is to be noted that the name of this witness is also reflected in the marriage certificate brought on record by the Respondent which is dated 24.9.1984, referred to above. In the said certificate he is shown as a witness to the said

marriage. Therefore, reading the testimony of this witness with that of the Petitioner, the only irresistible conclusion follows is that these documents, upon which the Respondent heavily relies to show that the muslim marriage between the parties was performed on 11.11.1975 are actually prepared in the year 1984, but the record was prepared back-dated to show that the children are also legitimate Muslim. The fact remains that thereafter in the year 1983, the Respondent went to Saudi Arabia as a doctor and served there upto 1992. Several correspondence which is reflected from the cross-examination supports the case of the Petitioner. What we find is that the Petitioner has brought the best possible evidence on record as against that there is a solitary statement of the Respondent in respect of the conversion of the Respondent to the Islam and performance of the Muslim marriage. We find that the Respondent is not telling the truth on several occasions and trying to twist up the story. Therefore, we have no hesitation to come to a conclusion that both these documents were prepared back-dated and the conversion of the Respondent and the nikah of the Petitioner and Respondent had taken place in the year 1982.

26. It is to be noted that the Petitioner

herself has stated that since 1977 she is professing the Mahomedanism. The Mahomedan Law also lays down that *"the person may be Mahomedan by birth or he may be a Mahomedan by conversion. It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief. It is sufficient if he professes the Mahomedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed."* **(Article 19 of Mulla's Principles of Mahomedan Law.)**

. This is referred to, for the purpose that the Respondent claims that he is mahomedan. The Petitioner states that since 1977 she is professing the Islam, therefore, she also stands re-converted to the Mahomedanism. In fact, in the written statement, the Respondent has stated that after the performance of the Hindu marriage, within two days the Petitioner got re-converted to the Mahomedanism and the Respondent got converted to the Islam and they performed the Nikah. Therefore, on the point of reconversion of the Petitioner to Mahomedanism there is no dispute. The only thing in dispute is when the said re-conversion had taken place- whether

immediately within 2 days of their Hindu marriage or in the year 1977, as the Petitioner has pleaded. What we find is that, taking into consideration the totality of evidence and after having recorded the finding that the documents of conversion of the Respondent and the Nikahnama are back dated or ante-dated, prepared in the year 1982 or 1984, the Petitioner stands re-converted to Mahomedanism since 1977 and the Responendt stands converted to Islam in 1982 and they performed Nikah at that time.

27. All this we discussed for the purpose of ascertaining as to whether who is telling truth in the matter. Ultimately, what we find, after evaluating the pleadings and evidence led by the Petitioner and Respondent in respect of their re-conversion, conversion and the performance of the nikah, that the nikah has been performed in the year 1982. But, even though we accept the case of the Respondent still the date of nikah is 11.11.1975, i.e., **2 days after the performance of the Hindu marriage.** As such the question arises for our consideration is that: As a result of conversion of both parties to the Hindu marriage to other religion, and more specifically to Mahomedanism, what happens to their Hindu marriage, i.e., *whether that marriage stands dissolved*

automatically by the act of the parties OR whether the marriage evaporates as observed by the Family Court OR the marriage subsists between the parties unless and untill it is dissolved under the provisions of the Hindu Marriage Act and thereby justifies the filing of the instant Hindu marriage petition and gives jurisdiction to the court established under the Hindu Marriage Act, 1955.

28. From the above discussion, it is crystal clear that on 9.11.1975 the Petitioner got converted to the Hinduism and the parties performed the Hindu marriage. Thereafter at the later stage in 1982 the Petitioner and Respondent reconverted and converted to Mahomedanism and performed the nikah and on the date of filing of the petition both were not Hindus but they were Mahomedans.

29. The learned Advocate General has formed a point for consideration that- "Whether the second marriage performed under the Muslim law is valid and would result into dissolution of the first marriage performed under the Hindu law ?"

30. The Advocate General has submitted that this issue is no more res-integra. He has relied upon two

judgments of the Supreme Court of India, namely, **1995(3) SCC 635 Sarla Mudgal (Smt.) President, Kalyani & Ors v/s. Union of India & Ors. and 2000(6) SCC 224 Lily Thomas & Ors. v/s. Union of India.** The Petitioner who appears in this matter in-person has also relied upon the Sarla Mudgal's case (Supra). The learned counsel for the respondent has also relied upon the Sarla Mudgal's case. Learned counsel for the Respondent also relied upon **AIR-1915 BOMBAY 151, Advocate General v/s. Jimba Bai & Ors.**

31. As stated earlier, the Sarla Mudgal's case was relied upon by the Petitioner and the learned Advocate General to support the contention that the Hindu marriage which was performed prior in point of time would not be dissolved by the performance of the second Muslim marriage. As against this, the Respondent has relied upon the same case to show that conversion to other religion must be a genuine one and if the conversion is for some ulterior motive or for material benefits then such a conversion shall not be taken as a genuine and the marriage between the parties is void. In the said case, the Supreme Court has considered the bunch of petitions together where the question involved was while the first Hindu marriage was in subsistence, the husband got converted

to the Islam and performed a Muslim marriage, whether such second marriage will be an offence under section 494 of the Indian Penal Code. The case of the husband in those petitions was that the Mahomedans are permitted to have four marriages and thereby their second marriage which they have performed after conversion to Mahomedanism would not fall within the ambit of section 494 of the Indian Penal Code. In paragraph 2 of the said judgment, the Hon'ble the Supreme Court of India has specifically framed the questions in following words:

> . "The questions for consideration are whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise a second marriage ? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continues to be a HIndu ? Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC) ?"

. So far as the present case is concerned the second question is relevant for our purpose. In paragraph 9, the Apex Court has observed that "the doctrine of indissolubility of marriage, under the traditional Hindu law, did not recognise that conversion would have the effect of dissolving a Hindu

marriage. Conversion to another religion by one or both the Hindu spouses did not dissolve the marriage." After taking reference to various earlier decided case, in paragraph 14, the Apex Court has observed that:

> "14. It is, thus, obvious from the catena of case-law that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be a Hindu. We, therefore, hold that under the Hindu Personal Law as it existed prior to its condification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.
>
> 15. The position has not changed after coming into force of the Hindu Marriage Act, 1955 (the Act) rather it has become worse for the apostate....."

. After taking into consideration the other provisions of the said Act, the Apex court has observed in paragraph 17 that:

> "17. It is obvious from the various

> provisions of the Act that the modern Hindu law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under Section 13 of the Act. In that situation parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of another wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage qua his wife who married him under the Act and continues to be a Hindu. Between the apostate and his Hindu wife the second marriage is in violation of the provisions of the Act and as such would be non-est."

32. In second case, reported in 2000(6) SCC 224, Lily Thomas (Supra), a review of the Sarla Mudgal's case was sought in the backdrop of observations that "the second marriage of a Hindu husband after converting to Islam, without dissolution of the first marriage under law, would be invalid in terms of Section 494 of the IPC and the apostate would be guilty of bigamy under that section."

. After considering the Sarla Mudgal's case and the points raised, the review petition and writ petitions were dismissed by the Supreme Court. In the result, the first marriage celebrated under the Hindu

law unless it is dissolved in accordance with the provisions of Section 13 of the said Act, it subsists and exists and it does not stand dissolved by the act of one of the parties and/or both parties to the said marriage. The Hindu marriage, in view of the provisions of Section 7 is not simply a contract like that of a Muslim marriage, but it is a sacrament. In view of the statutory provisions of the 1955 Act, though the traditional law stands modified, still the position remains that unless and untill under the said Act, by an appropriate proceeding, the marriage is dissolved, the marriage subsists and exists. Therefore, the observations of the trial court that as a result of the performance of the marriage by the Petitioner and Respondent under Mahomedan law, earlier hindu marriage stands evaporated is misconception and is equally against the ratio laid down by the Apex Court in these cases.

33. The next question which requires consideration is -

> "as to whether it is necessary that the parties to a petition presented under the Hindu Marriage Act need to be Hindu by religion on the date of the filing of the

petition."

34. The learned Advocate General has relied upon the scheme of the Act and two judgments, namely, **AIR-1983 Delhi 351 Vilayat Raj v/s. Smt. Sunila and AIR 1979 DELHI 78 Mrs. Pramilla Khosla v/s. Rajnish Kumar Khosla.** The learned counsel for the respondent also relied upon the Vilayat Raj's case (supra).

35. Coming back to the earlier discussion in this judgment in respect of Section 2 which provides for an application of the Act, we have observed who are the "Hindus" under the Act equally the reference is made to the word "HINDU" which appears in section 5 which provides for conditions for a Hindu Marriage. Section 4 deals with an overriding effect of the Act and, has laid down that:

> "Save as otherwise expressly provided in this Act-
>
> (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is

inconsistent with any of the provisions contained in this Act."

. Therefore in view of the overriding effect, everything is required to be considered within the provisions of this Act. After Section 5, Section 7 lays down the ceremonies for hindu marriage and it is recognised that-

"(1) A hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (i.e., the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

. Therefore, the customary rites and ceremonies, where such rites include the Saptabdi is necessary to complete the marriage. Thereby the essential of the marriage, the customary rites and ceremonies which were to be performed have been maintained and in the result the marriage has been construed to be a sacrament. The same is the observation of the Apex Court in Sarla Mudgal's case (Supra).

36. Section 8 speaks about the registration of the marriage. Section 9 speaks about the restitution of the conjugal rights. Section 10 speaks about the judicial separation. Sections 11 and 12 speaks about what are the void and voidable marriages. Section 13 speaks about dissolution of marriage. Section 13-A is in respect of the alternate relief in divorce proceedings and Section 13-B is in respect of the divorce by mutual consent of the parties. Rest of the provisions are in respect of other formalities. We are not going to consider them in the present matter.

37. What we find is that that except Section 5, as observed earlier, the word "HINDU" is not used in any of the sections, namely, Sections 9 to 13-B. Here it is important to point out the phraseology of each section.

Section 9 starts with the words - "When either the husband or the wife has, without reasonable excuse .....the aggrieved party may apply.."

Section 10 begins with the words - "Either

party to the marriage, ... may present a petition....."

Section 11 states that "..... on a petition presented by either party thereto, (against the other party), ... be so declared....."

Section 12 states that "Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds ....."
(Since the marriage is to be declared voidable at the OPTION OF THE PARTY there are certain restrictions on a party coming to the Court.

Section 13-A also starts with the wording - "There are ..... husband or wife, any marriage be dissolved by a decree of divorce."

Section 13-B begins with the words "a petition for a dissolution of marriage by a decree of divorce may be presented to the District court by both the parties to a

marriage together,....."

38. The reference to these provisions will point out that none of these provisions lays down that the party/ies to the petition on the date of filing of the petition should be a Hindu.

39. In Section 13(1)(ii) one of the grounds for dissolution of marriage is that "either party has ceased to be a Hindu by conversion to another religion."

. Thus, by this provision it is laid down that when the marriage between the two Hindus is performed but one of the party has ceased to be a hindu, as a result of the conversion to another religion, then the option is given to the party who has remained to be hindu to get the marriage dissolved. However, if the party who has remained hindu does not want to get the marriage dissolved, the marriage will not stand dissolved automatically on the conversion of other party. In that eventuality, the party who has converted to other religion, may not be permitted to file a petition under Section 13(1)(ii); because that would amount to granting a benefit in favour of that party of the wrongs committed by the said party

itself.

40. However, in view of the fact that since the hindu marriage subsists between the parties such a converted party may file a petition for dissolution of their marriage on other grounds stated in Section 13 and in that eventuality the said petition for dissolution of marriage would be between the parties wherein the Petitioner is a non-hindu as against the Respondent being hindu. Similarly relief can be claimed under section 10 by a non-hindu for judicial separation except on the ground of his own conversion.

41. Where one of the parties to the marriage has converted to other religion, but the other party has not dissolved the marriage and accepted the conversion of the other party and thereby files a petition for restitution of conjugal rights, the other party would not be entitled to withdraw such right of association to such a petitioner except for a reasonable excuse and the said reasonable excuse would not include the defence of conversion.

42. This is thoroughly analysed with the object to point out that the Legislature was aware of these aspects, and therefore while framing subsequent

sections provided for various reliefs to be obtained by the wife and husband; the Legislature has adopted a phraseology as demonstrated above and has not used the wordings as "Hindu wife" and/or "Hindu husband" and/or "Hindu".

. Therefore, the result is that the section 2 which speaks about the application of the Act to the Hindus has a limited effect to the performance of the marriage, as provided in sections 5 and 7 and it is not necessary that on the date of filing of the petition, the Petitioner shall be a Hindu. We get support to this proposition from **AIR-1983 Delhi 351.** The point which was involved in the said case was *"Whether the apostate of the Hinduism can file a petition under the Hindu marriage Act seeking dissolution of the marriage, solemnised under that Act prior to his change of faith."* The facts of the case were that : on 17th June 1978, Sunila, the respondent was married to Vilayatraj, the petitioner. The parties were both Hindus at the time of marriage. The marriage took place in Delhi and was solemnized in accordance with Hindu rites and ceremonies. On 15/9/1980 a child was born of this marriage. Subsequently the parties separated. Thereafter, on 1/8/1981 the petitioner filed a petition under section

13(1)(ia) of the Hindu Marriage Act, 1955. He sought dissolution of the aforementioned Hindu marriage on the ground of cruelty. In the said petition, the petitioner indicated his name as "Vilayatraj @ Vilayatkhan s/o Krishan Lal". In paragraph dealing with his status, he set out his status as " Hindu Bachelor" before marriage and "Mohammadan married" at the time of filing of the petition. His case against the respondent is shown as limited to the allegations of cruelty. The relief is sought on the ground of cruelty. The respondent who appeared in the said petition, instead of filing a written statement, moved an application under section 2 of the Act praying that the petition under section 13(1) is not maintainable. According to her, it is apparent from the fact that the petitioner was admittedly a Mohammadan on the date that the petition was filed and as such, he had ceased to be a Hindu, he had lost his right to move a petition under the Act. In paragraph 21, 22 and 23,

it is observed that-

> "21. Before parting with this section, it is pertinent and necessary to note one of the other grounds mentioned in the said section. This is S. 13(1) (ii). It provides that a petition can be presented by either spouse for dissolution of the marriage on the ground that the other party "has ceased to be a Hindu by conversion to another religion."

22. This would clearly indicate that the Act contemplates a situation, at the time of presentation of the petition, where one of the parties is not a Hindu. As such, a petitioning spouse, who is a Hindu, can present a petition for divorce against the respondent spouse who has ceased to be a Hindu. For, what is being sought to be dissolved is the Hindu marriage. Then, why should a spouse who has ceased to be a Hindu be debarred from presenting a petition for dissolution of the Hindu marriage under the Act, if some ground is available to him?

23. The petition, as already noted, is under Section 13(1) (ia) of the Act. It has nothing to do with the ground which would be available in the present case, to the respondent under Sec. 13(1)(ii). Therefore, the crux of the case is, does the applicability of the Act depend on whether the parties are Hindus at the time of solemnization of the marriage or must they also be Hindus at the time of filing of the petition ? The marriage sought to be dissolved under the Act has to be a Hindu marriage. It can be dissolved only in accordance with the provisions of the Act. It would, therefore, appear that when Section 2 says that this Act applies to any person who is a Hindu, it also contemplates a person who was a Hindu at the time of marriage but has since ceased to be a Hindu at the time when the petition is presented. The relevant date on which both the parties are required to be Hindus in order for the Act to apply is the date of the marriage."

43. Therefore, accepting the observations and approach of the said judgment we also find it appropriate that the relevant date on which both parties should be Hindu is the date of marriage; For,

it is the Hindu Marriage which is sought to be dissolved.

44. Though the facts in the above referred case were not direcly on the point which we are now considering, namely, in that case, the Petitioner was converted non-hindu. However, in paragraph No. 28, High Court has also considered the situation as to what would happen if both parties to the Hindu marriage get converted to other religion. It observes in the following words that-

> "28.....if the act is interpretated to imply that both the parties must be Hindus or at least the petitioning party must be a Hindu, even on the date of presentation of the petition, this would make nonsense of the Act in certain cases. For instance, if subsequent to the solemnisation of a marriage in compliance with section 5 of the Act, both the parties decided to embrace Islam, could the Hindu marriage be repudiated according to the Islamic tenets? It would appear not. For, it is only a Muslim marriage which can be repudiated in that manner. A unilateral dissolution by the husband on saying "talaq", "talaq", "talaq" cannot be a permissible manner of breaking the bonds of a Hindu marriage."

. It is further observed that "change of religion by one of the parties does not automatically operate as the dissolution of the marriage but provides a ground for dissolution. Conversion also

does not per se operate to deprive the party of the rights which may be otherwise available to him under the Act."

. Though there is a refrence made to AIR 1979 Delhi page 78, we do not find that the case is relevant and moreso in the backdrop of the Supreme Court decision in Sarla Mudgal's case(Supra).

45. In the result, what we find is that if parties to the marriage, when it was solemnised are Hindus and since the said marriage is sacrosant, can be dissolved by the parties only under the provisions of the said Act. Such applicaiton for dissolution will have to be filed by the parties to the said marriage even though one of the party to the said marriage or both parties to the said marriage are not hindus on the date of presentation of the petition. Apart from the Delhi High Court judgement, we draw support to the said conclusion from the judgemnt of the Apex Court in Sarla Mudgal's case (supra) (Particularly paragraph 9 of the said judgment; more specifically quoted., "the doctrine of indissolubility of the marriage, under the traditional Hindu law, did not recognise that the conversion would have to the effect of dissolving a Hindu marriage. Convesion to

another religion by or both the Hindu spouses did not dissolve the marriage." This was position observed by the Apex Court prior to the Act 1955 and the Apex Court has further observed in paragraph in 15 "that the position has not changed after coming into force of the Hindu Marriage Act, 1955, rather it has become worse for the apostate.") Therefore, we record our finding in the present case that:-

(1) The conversion of the Petitioner was genuine and bonafide.

(2) Hindu marriage between the Petitioner and Respondent dated 9.11.1975 is a valid one and the said Hindu marraige is not either affected, dissolved or evaporated as result of the subsequent conversion of the Petitioner and Respondent to Mahomedanism and performance of Nikah by them.

(3) And, even though on the date of filing of the petition both, the husband and wife are not Hindus, the petition for dissolution of the Hindu marriage since filed on a ground other than conversion to other religion, i.e., on the ground of

cruelty and dessertion, is very much maintainable under the Hindu Marriage Act, 1955.

(4) We have noticed from the judgemnt of the trial court, since the trial court came to the conclusion that the Hindu marriage is void and has evaporated, the other issues have not been discussed. On the contrary, the finding on various issues recorded is "does not survive". But we have found that the other issues require thorough consideration on the basis of the evidence on record. The trial court has dealt with those issues in a very scanty and shipshod manner. Therefore, we set aside findings on those issues. It will be inappropriate on our part to record findings of a fact on evaluation of evidence first time in this court. We, therefore, find it proper to direct the trial court to record findings on other issues after evaluating evidence led by the parties. Therefore, we pass the following order.

ORDER

1. Appeal is partly allowed.

2. The order of dismissal of the petition is hereby set aside. It is hereby held that the petition filed by the appellant is maintainable under the Hindu Marriage Act, 1955.

3. The matter is remanded back to the trial court for recording findings on rest of the issues and after appreciating the evidence on record. For that purpose the trial court may re-hear the arguments, if desired by the parties.

4. The order dated 21.11.1995 passed by the family court in M.J.Petition No.A/1945 of 1992 and undertaking dated 18.1.1996 filed by the respondent in pursuance thereof shall remain into force till the final disposal of the petition by the Family Court.

(R.S.MOHITE, J.) **(S.B.MHASE,J.)**

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